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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re CHRISTINE M. et al., A Person  
Coming Under Juvenile Court Law.

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LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN &  
FAMILY SERVICES,

Plaintiff and Respondent,

vs.

CHRISTINE M.,

Defendant and Appellant.

B175381

(Los Angeles County  
Super. Ct. No. CK054401)

APPEAL from orders of the Superior Court of Los Angeles County.

Lori Schroeder, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed  
with directions.

Lori A. Fields, for Defendant and Appellant.

Larry Cory, Assistant County Counsel and Kristine P. Miles, Senior Deputy  
County Counsel, for Petitioner and Respondent.

In this Welfare and Institutions section 300 dependency case, the minor child Christine M. appeals from a disposition order.<sup>1 2</sup> She asserts that the government agency involved in this case, the Department of Children and Family Services of the County of Los Angeles (the Department), sent inadequate “ICWA” notices and this error requires that we reverse the disposition and adjudication orders.<sup>3</sup> The Department acknowledges that the ICWA notices it sent were not adequate, but it rejects the argument that the orders must be reversed. We will reverse the orders and remand this case for further proceedings.

### ***BACKGROUND OF THE CASE***

#### *1. The Petition, Detention Report, and Detention Hearing*

The Department filed its juvenile dependency petition on January 22, 2004. Christine M. was 14 years of age at that time and was being detained with her maternal aunt. Christine M.’s sister Nessa M. was 16 years of age and was to be detained but

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<sup>1</sup> Unless otherwise indicated, all references herein to statutes are to the Welfare and Institutions Code.

<sup>2</sup> In a dependency case, the disposition order constitutes the judgment and is the first appealable order. *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1250.)

<sup>3</sup> The term “ICWA” refers to the Indian Child Welfare Act of 1978, found at 25 U.S.C. section 1901 et seq.

was a runaway at that time.<sup>4</sup> The minors' mother is Anne S. (Mother). The presumed father of the minors is James M. (Father).<sup>5</sup>

The petition alleges the minors' paternal uncle, Greg M. (Uncle), on more than one occasion, sexually abused Nessa M. by, including but not limited to, fondling her breasts and genitals. The petition alleges he did this in exchange for providing Nessa M. with illegal drugs, he himself uses illegal drugs in the children's home (where he lives), Mother knew of all these matters but failed to take action to protect Nessa M., and such conduct by Uncle and Mother endangers Nessa M.'s physical and emotional health and safety and places appellant Christine M. at risk of similar abuse. The allegations are based on statements made by Nessa M.<sup>6</sup>

The Department's detention report states that based on information from the children's paternal aunt, the ICWA applies in this case, and the tribe is the Cherokee tribe. At the January 22, 2004 detention hearing, the court found the Department had stated a prima facie case, in its petition, that Nessa M. comes within the provisions of section 300, subdivisions (b), (c) and (d), that Christine M. comes within the provisions of subdivisions (b), (d) and (j) of section 300, and that allowing them to remain in Mother's home would be against the children's interests. Mother was given

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<sup>4</sup> By January 27, Nessa M. was living in a shelter and the Department was searching for suitable housing for her.

<sup>5</sup> The Department's detention report states Mother and Father were divorced in 1989.

<sup>6</sup> Nessa M. reported that Mother and Uncle were in a relationship which began in April 2003.

monitored visits. Mother's attorney stated the minors have American Indian Cherokee heritage on Father's side but not Mother's. The court referred the case for investigation to the Bureau of Indian Affairs and the Cherokee tribe. Counsel for Christine M. requested a no time waiver adjudication hearing, and the hearing was set for February 5. Counsel for the Department indicated his belief that "the I.C.W.A. provisions seem to run afoul with a no-time waiver. In this situation, we cannot give adequate notice to the Indian tribe by the date of the adjudication." The court stated the Department should use its best efforts.

## *2. The Adjudication and Disposition Hearings*

The scheduled February 5 adjudication hearing did not go forward because the attorney who was appointed for Nessa M. that very day indicated she needed time for "consultation and investigation" and counsel for the Department indicated the Department would need time to interview witnesses whose names had been given to him that day. The court set the matter for February 17, however, on that date, the court was engaged in trial. The court set a date of February 26 for trial setting and for a report on Mother's representation that she was changing residences and would not be living with Uncle so that Christine M. could be returned to her.

On February 26, the court was informed that Christine M.'s counsel had relinquished her no time waiver for adjudication. Mother was still in the process of finding an apartment to rent. Mediation was requested and a date of March 12 was set for it, as well as a trial date of March 19 if mediation did not resolve all issues.

At the March 12 mediation, Mother agreed that the petition would be amended to say that Uncle, a member of the household, sexually abused Nessa M. on more than one occasion by including but limited to, fondling her breasts and genitals, that he has done this in exchange for drugs, that Mother was not able to take action to protect Nessa M. (and Christine M.—to be argued), that these things endanger Nessa M.’s (and Christine M.’s—to be argued) physical and emotional health and safety, and place her (and Christine M.—to be argued) at risk of similar abuse and harm. Mother agreed to a disposition plan for Nessa M. of suitable placement and family reunification services and to a contested disposition for Christine M. if the court sustained the allegation that Christine M. is an at-risk sibling. The case was set for March 18 for Mother’s waiver of rights as to the mediation agreement and contested disposition as to Christine M. if necessary.

At the March 18 hearing, Mother signed a waiver of rights whereby she, among other things, submitted on the amended petition on the basis of the social worker’s reports and other documents, if any. The court accepted into evidence the January 22 detention report, the February 2 jurisdiction/disposition report and the further jurisdiction/disposition report of February 17. The court stated it would not consider, for purposes of adjudication as to Christine M., statements by Nessa M.’s boyfriend that Christine M. has “done speed” and had asked him and Nessa M. if they had any speed. The court sustained the allegations as to Nessa M. (under subdivisions (b) and (d)). Initially, the court found there was not a preponderance of the evidence to sustain the allegations of the petition as to Christine M. and the court indicated it would

dismiss the petition without prejudice as to her. However, the court then indicated it wished to reconsider the evidence before it made a definitive finding about Christine M.

The court recalled the case later in the day and indicated it believed it would be inconsistent to sustain the allegations in the petition as to Nessa M. and yet find that Christine M. would not be at risk in Mother's home, and it indicated that without jurisdiction over Christine M., the minor would be free to return to Mother's home even if Uncle lived there. Therefore, court sustained the allegations in the petition as to Christine M. under subdivision (j) (that is, that Christine M.'s sibling was abused and there is a substantial risk that Christine M. could be abused). The court ordered the Department to actively assist Mother in finding housing, including providing her with referrals, and gave the Department discretion to release Christine M. to Mother if Mother found housing before the next scheduled hearing, and if the Department could verify Uncle was not living there. The court indicated that in such a situation, its tentative would be to return Christine M. to Mother's home. The case was continued to April 15 for disposition based on Mother's housing situation.

The Department's disposition report states the social worker communicated with the local housing authority asking that it assist Mother in finding housing, and sent Mother a list of local shelters and a copies of two of the Department's 2002 resource directories, which include several agencies working in low income housing. The social worker inquired as to whether Mother could receive family preservation assistance with finding housing but was told she could not because Christine M. was

not in need of services. On March 25, the social worker spoke with Mother and told her to follow up with the local city's housing authority by submitting an application.

By the time of the April 15 disposition hearing, Mother had obtained a job but not housing. The court declared the minors dependents, ordered them into suitable placement, with Christine M. to remain placed with her maternal aunt.

On May 18, the minor Christine M. filed a notice of appeal from the disposition order.

### 3. *The ICWA Information In the Various Department Reports*

As noted above, the Department's January 22 detention report states that based on a statement by the minors' paternal aunt, the ICWA applies in this case. The report states the tribe is the Cherokee. The February 5 jurisdiction/disposition report states the Department's investigator mailed ICWA notices to the Bureau of Indian Affairs, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee, all sent on January 27, and all indicating the date, place and time of the February 5 hearing. Specifically, a "notice of involuntary child custody proceeding involving an Indian child" form was sent to the Bureau of Indian Affairs in Sacramento, California. Additionally, that same form notice, along with a "request for confirmation of child's status as Indian" form, were sent to the Cherokee Nation of Oklahoma, in Tahlequah, Oklahoma, to the Eastern Band of Cherokee Indians in Cherokee, North Carolina, and to the United Keetoowah Band of Cherokee in Park Hill, Oklahoma. ~76 et seq.~ The February 5 report also states that on January 30, the social worker interviewed Uncle "and he stated that there was not

enough Native American ancestry. He stated that his family is Irish and American.” Uncle told the social worker two family last names. Included with the Department’s February 17 jurisdiction/disposition report were the return receipts from the United Keetoowah Band of Cherokee and the Cherokee Nation of Oklahoma.

The March 12 interim report states the ICWA does not apply. It includes February 23, 2004 letters from the Cherokee Center for Family Services in Cherokee, North Carolina regarding the minors. The letters are addressed to the Department’s investigator. They state that based on the information received from the investigator, and a review of the Eastern Band of Cherokee Indians’ tribal registry, the minors are not registered as members of that tribe, nor eligible to register as members, and they are not considered “Indian Children” in relation to the Eastern Band of Cherokee Indians, as that term is defined in 25 U.S.C., Section 1903 (4).<sup>7</sup> The letter advised there would thus be no intervention by the Eastern Band of Cherokee Indians in this case.

### ***ISSUE ON APPEAL***

The appellant minor Christine M., and the Department, both agree that the ICWA notices were not proper. However, Christine M. argues that the jurisdiction and disposition orders in this matter should be reversed and remanded, while the

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<sup>7</sup> 25 U.S.C. section 1903 (4) states: “ ‘Indian child’ means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is [sic] eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”



Department asserts the orders should stand and the matter remanded with directions to provide proper ICWA notice.

### ***DISCUSSION***

#### ***1. The Purpose and Requirements of the ICWA***

The ICWA was enacted because of the alarmingly high number of Native American children who were being removed from their families and tribes by abusive child welfare practices and placed in adoptive or foster care homes which were usually non-Native American homes. (*Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30, 32 [104 L.Ed.2d 29, 36, 109 S.Ct. 1597].) “In passing the Act, Congress identified two important, and sometimes independent policies. The first, to protect the interests of the Indian child. The second, to promote the stability and security of Indian tribes and families.” (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)

“At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child ‘who resides or is domiciled within the reservation of such tribe,’ as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: . . .” (*Mississippi Choctaw v. Holyfield*, *supra*, 490 U.S. 30, 36, fn. omitted.)

Section 1911(b) of the ICWA states: “In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not

domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe." Additionally, section 1911(c) states: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."

Obviously, in order for a tribe to exercise its rights under section 1911, the tribe must receive notice of the state court proceedings. "Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1421.) "The Indian status of the child need not be certain. Notice is required whenever the court knows or has reason to believe the child is an Indian child." (*Id.* at p. 1422; accord *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848, where the court stated that because it is the tribe that determines a child's Native American status, "the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.")

Regarding notice to tribes, section 1912(a) of the ICWA states: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or

termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary; *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding."

2. *The Defects In the Department's ICWA Notices, and Other Deficiencies*

The Department agrees with Christine M.'s assertion that the notices sent to the Bureau of Indian Affairs and the three Cherokee tribes are inadequate. Only one of the forms was sent to the Bureau of Indian Affairs. (*In re C.D.* (2003) 110 Cal.App.4th 214, 223-226.) One of the forms that was sent to the three tribes was barely filled out. Information about Christine M.'s parental and maternal grandparents was listed as "unknown" even though the social worker had access to Mother and her sisters, and to Father's relatives, to gain such information. Thus, the response from one of the tribes that "based on the information received from [the Department]" Christine M. and Nessa M. were not registered members of the tribe nor eligible to register is rather meaningless. Moreover, there is no indication that the Department mailed, with the

forms, a copy of its dependency petition. Only after proper notice is given and responses received can the court make its finding whether the ICWA applies in this case. When proper notice is given, a tribe can make an informed determination whether the subject child is an Indian child and whether the tribe wishes to intervene in the matter or request that jurisdiction be transferred to the tribe.

### 3. *Appropriate Remedies*

Christine M. and the Department do not dispute that proper notices must be sent out by the Department upon remand of this case, if the Department has not already sent them. What is disputed is whether the trial court's jurisdiction and disposition orders must be reversed.

Once proper notices are sent out, proceedings in a case must be suspended until at least 10 days after the notices are received by the Bureau of Indian Affairs and the tribes. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 704; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471, 474-475.) When proper notice is not given, the dependency court erroneously proceeds to determine jurisdiction and disposition orders. (*Ibid.*) Deficient ICWA notice is usually prejudicial. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411.) "Unless a tribe has participated in or expressly indicated no interest in the proceedings, the failure to comply with ICWA notice requirements (25 U.S.C. § 1912(a)) constitutes prejudicial error." (*In re H. A.* (2002) 103 Cal.App.4th 1206, 1213.)

Conducting an adjudication and disposition hearing prior to a tribe (1) receiving proper ICWA notice and (2) having a minimum of ten days to respond, is an assault on

the reason for giving notice—to allow the tribe the opportunity to determine whether it wishes to intervene in the state’s case or have jurisdiction transferred to the tribe. Indeed, at the January 22 detention hearing in this case, the Department’s attorney recognized this when he questioned whether there would be sufficient time for the Department to give proper ICWA notice, coupled with the minimum ten-day waiting period in 25 U.S.C. section 1912(a), if the court scheduled the adjudication hearing for February 5.

We will therefore reverse the disposition order and direct the trial court to vacate that order and its jurisdiction order. Upon remand of this case, Christine M. and Nessa M. should remain detained under the detention order until after proper ICWA notice is given and the required waiting time period has passed. If then there is no indication that intervention or a transfer of jurisdiction is desired by a tribe, the trial court may then reinstate its jurisdiction and disposition orders since Christine M. has not challenged them on their substantive merits.

***DISPOSITION***

The disposition order is reversed, the trial court is directed to vacate the disposition order and the jurisdiction order, and the cause is remanded for further proceedings consistent with the views expressed herein.

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CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.